LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JUN 11 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1625

STEPHEN L. GREGORY, et al.,
Petitioners,
v.
CURTIS W. TARR, National Director of
Selective Service, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

CHARLES DONAHUE, JR.
Room 950, Legal Research Building
Ann Arbor, Michigan 48104

MARC STICKGOLD
726 Pallister
Detroit, Michigan 48202
Counsel for Petitioners

LAFFERTY, REOSTI, JABARA,
PAPAKHIAN, JAMES, STICKGOLD,
SMITH & SOBLE
726 Pallister
Detroit, Michigan 48202
Of Counsel

June, 1971

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1625

STEPHEN L. GREGORY, et al.,
Petitioners,
v.
CURTIS W. TARR, National Director of
Selective Service, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

A. The Government, in its opposing brief in Nos. 1625 and 1556, continues, as it did below, to seek to distinguish *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233 (1968), and *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970), by pulling scattered phrases out of context from those opinions and arguing that the distinctions to be drawn therefrom are dispositive. The act of the local board, the Government argues, must be "blatantly lawless"; it must involve "a clear departure by the Board from its statutory mandate." What the Government fails to do is to suggest a consistent theory whereby the underlying rationale of the *Oestereich* and *Breen* opinions may be reconciled with the opinion of the

Sixth Circuit below. As shown in the Petition in No. 1625 (pp. 9-15, 24-27 [hereinafter "Petition"]), that opinion cannot be reconciled with *Oestereich* and *Breen* whether those opinions be taken as making judicial review depend on the mandatory nature of the classification in question or on the competence of the Selective Service processes to adjudicate the issue in question.

The instant case, involving as it does a mandatory regulation and a purely legal question beyond the competence of the System, falls within either rationale. (Petitioners note in passing that *McGee v. United States,* 39 U.S. L.W. 4571 (No. 362, May 17, 1971), is a further indication that judicial review is available in those instances in which a legal question is presented but not in those instances where the Selective Service System provides a competent forum for review of factual and discretionary questions. Although *McGee* is a criminal case, it concerns the exhaustion of Selective Service administrative remedies, the doctrine traditionally applied to deny review in civil pre-induction cases. *See Estep v. United States,* 327 U.S. 114, 123 (1946). *McKart v. United States,* 395 U.S. 185 (1969), and *McGee* when read together clearly hold that exhaustion of administrative remedies need not occur when the question involved is, as in the instant case, a purely legal one.)

Not only does the Government's brief ignore the underlying rationale of *Oestereich* and *Breen,* but it also fails to note the widely varying opinions in the circuits concerning the question of pre-induction judicial review (Petition, pp. 23-26). In this regard, the Eighth Circuit has recently joined the Third (Petition, pp. 13-15, 21-22) and D.C. (Petition, pp. 13-15 & n.1, *infra*) Circuits in holding, contrary to the judgment of the Sixth Circuit below, that legal issues of regulatory interpretation are cognizable in pre-induc-

tion judicial review. *Liese v. Local Bd. No. 102*, 3 S.S.L.R. 3860 (8th Cir. Mar. 29, 1971); *Zerillo v. Local Bd. No. 102*, 3 S.S.L.R. 3861 (*ibid.*). Even if the law were as clear as the Government would like to make it be, such conflict among the circuits should lead this Court to grant review in the instant case.

Nor do petitioners concede, as the Government would have them concede (Gov. Brief, p. 11), that the issue before the Court in *Fein v. Selective Service System Local Board No. 7*, 430 F.2d 376 (2d Cir. 1970); *cert. granted*, 39 U.S.L.W. 3384 (No. 1129, Mar. 8, 1971), is not presented in the instant case. Rather, they contend, as argued in the Petition (pp. 26-27), that this case presents other aspects of the *same* issue, i.e., the scope of pre-induction judicial review. True, as conceded in the Petition, this case does not present the square conflict between the mandatory classification and competent forum tests that the *Fein* case does, but, like *Fein*, it presents an opportunity for clarification of the nature and contents of those tests. A ruling for petitioners in *Fein* would necessarily cast into doubt the judgment of the Sixth Circuit below since that judgment ignores the law-fact distinction which lies at the heart of the *Fein* case and of the competent forum test. On the other hand, a ruling in this case rather than in *Fein* would give this Court an opportunity to avoid the square conflict between the mandatory classification and competent forum tests raised by *Fein* and would permit further evolution of the doctrine of pre-induction review in the circuits.

B. Turning to the merits of the case, the Government, without attempting to deny that petitioners' interpretation of the Regulation in question is plausible, argues, rather, that the litigation positions taken by it bring the interpretation of that Regulation within the doctrine of *Ehlert v.*

United States, 39 U.S.L.W. 4453 (No. 120, April 21, 1971). It is difficult to see how the Government derives much consolation from the *Ehlert* case.[1] *Ehlert* involved a purely administrative regulation concerning the right of a registrant, after his induction order had been issued, to have his claim determined by his local board rather than the appropriate military authorities. Faced with an ambiguity in the Regulation, this Court chose to rely on a "reasonable, consistently applied administrative interpretation . . ." 39 U.S.L.W. 4455. The case at bar however, involves an interpretation of the Regulation in question which is unreasonable in the light of the Military Selective Service Act and its legislative history (Petition, pp. 16-18) and in the distinctions which it seeks to draw between those who have had a discretionary student deferment and those who have had other discretionary deferments (Petition, pp. 20-21).

Further, the interpretation which the Government has urged in litigation has been anything but consistently applied administratively. There are a number of cases of which counsel is aware in which registrants have been granted fatherhood III-A deferments in precisely the same situation of petitioners who have been denied them in the instant case. Further, the only administrative interpretation issuing from National Headquarters of the fatherhood III-A Regulation preserved, for a time, the ambiguity of the Regulation. Local Bd. Memorandum No. 105, ¶17, Apr. 23, 1970, S.S.L.R. 2200: 14 (Feb. 1970). Currently, the

---

[1] Nor is it easy to see how the Government derives much consolation from *Swift v. Director of Selective Service,* 3 S.S.L.R. 3839 (D.C. Cir. Mar. 16, 1971). However incorrect the judgment in that case may be on the merits in the light of *Ehlert,* it constitutes a clear holding that pre-induction review is available on questions of regulatory interpretation This holding clearly conflicts with the judgment of the Sixth Circuit in the instant case and presents an issue not present in *Ehlert,* which was a criminal and not a pre-induction review case.

Memorandum contains no reference to the bar on granting the deferment to those who have had the II-S since June 30, 1967, and implies that no such bar exists. *Id.*, as amended, Nov. 18, 1970, S.S.L.R. 2200: 14 (current). The interpretation of a similar reference to the II-S deferment in the Regulation concerning the I-S(C) deferment has also vacillated: for a while the I-S(C) Regulation was interpreted in a manner consistent with that which the Government is urging in the instant case. Local Bd. Memorandum No. 87, Apr. 19, 1968, S.S.L.R. 2200 (May, 1968). Recently, however, that interpretation has been reversed, and the Selective Service System is now interpreting the I-S(C) Regulation to refer only to the undergraduate and not the graduate II-S. *Id.*, as amended, Sept. 24, 1970, S.S. L.R. 2200 (current). Administrative consistency, if that is the criterion, would require that the similar language in the fatherhood regulation be interpreted in the same way.

C. The history of the I-S(C) Regulation also indicates another critical issue in this case, one which the Government conveniently chooses to ignore in its brief. As the litigation concerning the I-S(C) deferment and the checkered history of the interpretation of the Regulation indicate, the Government has not always conceded, as it does now (Gov. Brief, p. 8), that the Act forbids only those who have had the *undergraduate* II-S student deferment since June 30, 1967, from receiving the fatherhood III-A and I-S(C) deferments. The actions of the Selective Service System, the language of the Regulations, and the consistent position taken until very recently by the Government in litigation all indicate that the Government was laboring under the erroneous interpretation of the Act that all those who have had any sort of II-S student deferment since June 30, 1967, were barred from receiving the fatherhood III-A. Thus, what the Government now claims were acts of discretion by the President in promulgating regulations deny-

ing the fatherhood III-A deferment to those who had had the graduate II-S since June 30, 1967, were in fact not acts of discretion at all. They were, rather, acts which the Executive erroneously believed were controlled by the relevant law. In such a situation, as numerous decisions of this Court hold, the appropriate judicial reaction is to correct the administrative mistake of law (Petition, pp. 18-20).

• • • • •

The Government has not denied the importance and substantiality of the issues concerning pre-induction review raised by this case. Its only claim is that the number of litigants involved in this case is too few to warrant review on the merits. Granted, however, the substantiality of the jurisdictional questions, and granted that the liberty, and perhaps even lives, of an admittedly small class of registrants is at stake, petitioners suggest that review of the decision below is in order.

Respectfully submitted,

CHARLES DONAHUE, JR.
Room 950, Legal Research Building
Ann Arbor, Michigan 48104

MARC STICKGOLD
726 Pallister
Detroit, Michigan 48202
Counsel for Petitioners

LAFFERTY, REOSTI, JABARA,
PAPAKHIAN, JAMES, STICKGOLD,
SMITH & SOBLE
726 Pallister
Detroit, Michigan 48202
Of Counsel

June, 1971.